Supreme Court, U.S.
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No. 82-891

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHOENIX UNION HIGH SCHOOL DISTRICT, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

REX E. LEE
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QUESTION PRESENTED

Whether Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination in federally assisted programs, preempts application of a state law that would withhold from federal investigators information relevant to a Title VI investigation.

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The Solicitor General, on behalf of the United States, moves, pursuant to Sup. Ct. R. 16(1), that the appeal be dismissed or that the judgment of the court of appeals in this case be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-5a) is reported at 681 F. 2d 1235. The order of the district court (J.S. App. 6a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 9a) was entered on July 23, 1982. A petition for rehearing was denied on August 30, 1982 (Pet. App. 10a). A notice of appeal was filed on October 7, 1982 (Pet. App. 11a-12a), and an amended notice of appeal was filed on November 8, 1982. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(2), but there is a jurisdictional question. A decision holding application of a state law preempted by federal law comes within this Court's appellate jurisdiction. See *Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982).

STATEMENT

1. In 1980, the United States Department of Education was investigating the Phoenix Union High School District to determine whether the school district was complying with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Title VI prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally assisted program or activity.

During the course of the investigation, investigators determined that minutes of the school board's executive sessions might contain relevant material and asked to see the minutes (J.S. App. 1a-2a). The school superintendent refused to turn over the minutes, stating that they were confidential under Ariz. Rev. Stat. Ann. § 38-431.03(B) (1982 Supp.), which provides: "Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive session" (J.S. App. 2a).

After negotiations to obtain the minutes failed, the Department of Education, pursuant to 34 C.F.R. 100.8(a), referred the dispute to the Department of Justice. On April 13, 1981, the government filed suit, alleging that the school district's refusal to permit investigators access to the minutes violated Title VI, applicable federal regulations, and contractual assurances the district made upon receiving federal financial assistance. The government asked the court to direct the district to allow access to the records, and the government later moved for summary judgment (J.S. App. 2a).

2. On July 15, 1981, the district court granted summary judgment in favor of the government (J.S. App. 6a-8a) and ordered the school board to permit the government to see and copy relevant minutes. The court permitted the school district, prior to turning over the records, to remove those entries not relevant to the investigation or protected under the attorney-client privilege (*id.* at 7a). The court also prohibited the government from releasing the records to anyone outside the Justice Department or the Office of Civil Rights of the Department of Education without the district court's approval. The district court subsequently stayed its order pending appeal.

The court of appeals affirmed (J.S. App. 1a-5a). The court stated that, under Arizona law, the privilege was not absolute, but rather could be breached where the interests of disclosure, such as furtherance of a legal inquiry, outweighed those of confidentiality (*id.* at 2a-3a). The court then explained that the school district, when it accepted federal funds, had signed an assurance of compliance stating that the district would comply with Title VI regulations. One of these regulations, 34 C.F.R. 100.6(c), states that assertions of confidentiality may not bar the government's access to relevant material. Accordingly, the court of appeals held, the school district as part of the assurance of compliance had agreed to permit the government access to confidential material (J.S. App. 3a-4a). The court also held that, to the extent the state statute frustrates the Title VI investigation, it is preempted by Title VI (*id.* at 4a-5a).

3. On remand, the district court ordered the school district to comply with its original order. On December 29, 1982, the government received from the school district the executive session minutes that the district had been withholding pursuant to the state confidentiality statute.

DISCUSSION

1. At the outset, we note that the school district's recent delivery of executive session minutes does not moot this case. The district court's injunction requires the school district to deliver to the government copies of executive session minutes from January 4, 1961. The injunction is open-ended; there is no date on which the duty to release relevant minutes ceases (see J.S. App. 5a-6a). Accordingly, the injunction applies by its terms to future meetings. Since there is no indication in the record that the school district will no longer hold executive sessions, the injunction covers future school district activity, and therefore the controversy remains live. See, e.g., *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970).

A holding that this case is moot would allow appellants, who by filing their jurisdictional statement have indicated that they do not acquiesce in the judgment below, to return to their policy of denying the government access to executive session minutes that are needed for a Title VI investigation. When holding a case moot, this Court's practice is to vacate the lower court judgment and direct the court to dismiss the complaint. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 94 (1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39-41 (1950).[1] This resolution would free appellants to return in the future to their preferred practice of denying access, despite the holdings below that the district's practice is contrary to federal law and the possibility of similar future conduct. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982); *NLRB* v. *Raytheon Co.*, *supra*, 398 U.S. at 28. Accordingly, this case is not moot.

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[1]This is also the proper disposition when a case is pending on appeal even though probable jurisdiction has not been noted. See Reply Memorandum for the United States in *Donovan* v. *Blitz*, No. 82-611 (filed Jan. 4, 1982), a copy of which we are furnishing to counsel for appellants.

2. This case is not properly within the appellate jurisdiction of this Court. While the court of appeals did hold that the Arizona statute was preempted by Title VI, that was not the sole basis for its affirmance of the district court's disclosure order. The court apparently found that the Arizona statute itself did not prevent disclosure in the circumstances presented here (J.S. App. 2a-3a). Hence, even assuming that the appellants are correct in their contentions on the questions presented in the jurisdictional statement, they are not entitled to prevail unless the court of appeals' interpretation of Arizona law is reversed. It is unclear whether appellants have challenged that interpretation in their jurisdictional statement (see J.S. 5), but, in any event, the court of appeals' decision on that point does not fall within this Court's appellate jurisdiction under 28 U.S.C. 1254(2). Accordingly, the appeal should be dismissed. See R. Stern & E. Gressman, *Supreme Court Practice* 65-66 (5th ed. 1978); cf. *United States* v. *Hastings*, 296 U.S. 188, 193 (1935). Treating the appellants' papers as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied because it fails to present an issue warranting review by this Court.

3. a. If the state law discussion in the decision below is not considered dispositive and the decision is considered as resting solely on the preemption holding, the decision is plainly correct and the judgment should be affirmed.

Appellants' primary contention (J.S. 5-8) is that Title VI and its regulations do not preempt the state law at issue here. This contention is without merit. It is well established that state law must yield when its enforcement " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). While appellants correctly state (J.S. 7) that a court should first try to reconcile

state and federal law before invalidating the state law, they are mistaken in their view that the conflicting laws involved can be reconciled in their application here.

In enacting Title VI Congress intended to prevent recipients of federal assistance from using such assistance in programs that are operated in a discriminatory manner. The Department of Education is charged under 42 U.S.C. 2000d-1 with the duty to effectuate Title VI and to investigate a recipient like the appellant school district in order to discover whether it is complying with Title VI. Enforcement of the state law here would deny the Department access to material that might disclose violations of Title VI; hence, its enforcement is an "obstacle" to the Department's efforts to enforce Title VI.[2] Since there is no way to reconcile the laws and still permit a complete Title VI investigation, the state law is preempted to the extent that it frustrates the investigation.

b. Appellants' further contention (J.S. 8-9) that, when signing the assurance of compliance, they could not agree to disclose these minutes to the government because they had no authority to agree to abrogate the state law is similarly without merit. Because the state law is preempted to the extent it conflicts with Title VI, it does not bar the government's access to these records. Thus, appellant school district's assurance of compliance was effective to establish an agreement to provide the government with all documents relevant to a proper Title VI investigation. See, e.g., *United States* v. *El Camino Community College District*, 600 F. 2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). Cf. *Lau* v. *Nichols*, 414 U.S. 563, 568, 569 (1974).

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[2]There is no basis for appellants' suggestion (J.S. 7) that the applicable federal regulation, 34 C.F.R. 100.6(c), elevates state law over federal law and authorizes denying the government access to the minutes.

CONCLUSION

The appeal should be dismissed. Treating the papers as a petition for a writ of certiorari, the petition should be denied. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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